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12

13 UNITED STATES DISTRICT COURT
14 SOUTHERN DISTRICT OF CALIFORNIA
15

16 STARLIGHT CONSUMER
ELECTRONICS (USA), INC., (on its
17 own behalf and on behalf of HANG
SENG BANK)
18

19 Plaintiff,
20

21 v.
22

23 PETTERS CONSUMER BRANDS,
24 LLC, and DOES 1 through 100,
25

26 Defendants.
27
28

Case No. 3:07-cv-02102-IEG-RBB

**DEFENDANT'S REPLY IN
SUPPORT OF MOTION TO
COMPEL ARBITRATION**

DATE: January 14, 2008

TIME: 10:30 a.m.

DEPT: Courtroom 1

JUDGE: HON. IRMA E. GONZALEZ

1 **I. INTRODUCTION**

2 Starlight Consumer Electronics (USA) Inc. (“Starlight”) and Petters
3 Consumer Brands, LLC (“Petters”) entered into a Manufacturing Agreement
4 (“Manufacturing Agreement”) that contains an arbitration clause. The arbitration
5 clause is broad, and applies to all disputes, including disputes relating to Purchase
6 Orders issued by Petters for consumer electronics goods. Starlight asserts that
7 Petters owes money for consumer electronics goods delivered pursuant to Purchase
8 Orders that it subsequently invoiced. Starlight has assigned its right to receive
9 payment on the Purchase Orders to Hang Seng Bank (“HSB”). As the assignee of
10 Starlight’s rights, Hang Seng steps into the shoes of Starlight. Because Starlight is
11 required to arbitrate disputes relating to the Purchase Orders, HSB is also required
12 to arbitrate such disputes.

13 According to Starlight, it may simply assign the right to assert a breach for
14 non-payment without assigning the obligation to arbitrate. If that were true, any
15 party to a contract could avoid arbitration by assigning all provisions, except the
16 provision regarding arbitration. The enforceability of arbitration clauses would be
17 undermined. As one court held:

18 Under this logic a party to a contract containing an arbitration clause
19 could transfer all the substantive portions of a contract to a third party
20 except the arbitration clause. Because the arbitration clause had not
21 been transferred, that third party would be immune from arbitration of
22 any contract disputes. The same scenario could apply to a party
23 seeking to avoid a liquidated damages clause, a choice of venue or
24 law provision, or any other remedial measure in a contract. The law
 can simply not allow bargained for remedial rights to be avoided so
 easily.

25 Southeastern Pennsylvania Transportation Authority v. AWS Remediation,
26 Inc., No. Civ. A 03-695, 2003 WL 21994811, at * 3 (E.D. Pa. August 18,

27 2003).

28

II. ARGUMENT

A. **HSB' s Claims¹ Must be Arbitrated Because They Arise From and are Governed Solely by the Manufacturing Agreement.**

“[A]n order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” AT & T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 650 (1986). Here, despite Starlight’s arguments to the contrary, the Manufacturing Agreement’s arbitration clause governs the resolution of all claims in this suit.

1. **The Purchase Orders are expressly incorporated into the Manufacturing Agreement and serve as the exclusive contract between Petters and Starlight.**

The Manufacturing Agreement “appl[ies] to *all Purchase Orders* for all products and services placed by [Petters] to [Starlight].” [Ex. B to Coates Decl. at ¶ 2a (emphasis added).] The Agreement expressly incorporates the Purchase Orders into the Manufacturing Agreement and provides that “[t]he terms and conditions in [the Manufacturing Agreement] and attached to the Purchase Orders shall be the *exclusive contract terms* between [Petters and Starlight] with respect to [Petter’s] purchase of the Products.” [*Id.* at ¶ 4b (emphasis added).]

All of Starlight’s claims on behalf of HSB arise from and relate to Petters’ alleged non-payment for goods delivered pursuant to these Purchase Orders. [See Def’s Memo. of Points and Authorities, at pp. 4, 5, and 7.] It is undisputed that

¹ The Complaint, in its caption, provides that Starlight bring claims “*on its own behalf and on behalf of Hang Seng Bank.*” (emphasis added.) It appears that Starlight has now abandoned all claims it brought against Petters on its own behalf in an attempt to avoid the reach of the arbitration clause, and only seeks to pursue claims on behalf of HSB. [See Pl’s. Memo. of Points and Authorities, at pp. 3 and 8 (“Hang Seng Bank – not Starlight – is the real party in interest”; “Starlight . . . is not seeking to enforce any rights under the Manufacturing Agreement. Instead, Starlight is seeking to enforce Hang Seng Bank’s rights under the Factoring Agreement”)]

1 Starlight accepted the same Purchase Orders submitted by Petters,
2 “reaffirm[ing] . . . its acceptance of the terms of the [Manufacturing Agreement],”
3 and then manufactured and sold goods to Petters pursuant to the terms of these
4 Purchase Orders. [Id. at ¶ 4b (“[a]cceptance of a Purchase Order by [Starlight] is a
5 reaffirmation of its acceptance of the terms of [the Manufacturing Agreement], as
6 well as an acceptance of the terms and conditions attached to each Purchase
7 Order”).]

8 The invoices Starlight now seeks to collect on are all invoices for goods
9 manufactured and shipped by Starlight pursuant to the terms of the Manufacturing
10 Agreement and the specifications of the relevant Purchase Orders. Starlight even
11 alleges in its Complaint that its contractual claims are based on an amalgamation of
12 “agreements as stated in the Purchase Orders, Invoices, e-mails and the accounting
13 and book keeping systems of [HSB].” [Compl. at ¶ 22.] Because the
14 Manufacturing Agreement and relevant Purchase Orders constitute the “exclusive
15 contract terms” between Petters and Starlight for these consumer electronics goods,
16 “any controversy or claim arising out of or relating to” Petters’ alleged failure to
17 pay monies due from the purchase of these consumer electronics goods must be
18 arbitrated. [Ex. B to Coates Decl. at ¶ 21.]

19 **2. Starlight’s argument that the Manufacturing Agreement**
20 **does not create an obligation to deliver consumer electronics**
21 **goods or make payments is misleading and inaccurate.**

22 Starlight claims that the Manufacturing Agreement does not impose any
23 “obligation to deliver a product or make payment for same” and Starlight attempts
24 to minimize the application of the Manufacturing Agreement by arguing that it only
25 addresses Starlight’s right to manufacture Petters-brand products. [Pl’s. Memo. at
26 p. 5.] Starlight’s claims are misleading and inaccurate.
27
28

1 First, the Manufacturing Agreement does not, as Starlight suggests, constitute
2 a broad licensing agreement between the parties, but only provides Starlight with
3 the right to affix a "Polaroid" label on consumer electronic goods it manufactured
4 for Petters.

5 Next, contrary to Starlight's claims, the language of the Agreement and the
6 Purchase Orders (which are a part of the Manufacturing Agreement) identify
7 Starlight's obligations to deliver products, and Petters' obligation to pay for them.
8 The Manufacturing Agreement expressly contemplates that the Purchase Orders
9 would contain much of the information concerning each party's respective
10 obligations, including, the "identi[ty] [of] the Product ordered, the quantity thereof,
11 price, specific delivery dates, and such other information as the Parties mutually
12 agree," [*Id.* at ¶ 4a.] along with any applicable shipping delivery requirements,
13 including the carrier or method of transportation. [*Id.* at ¶ 5a.] Starlight's
14 acceptance of these Purchase Orders then created an obligation for Starlight to
15 manufacture and deliver the goods according to the manufacturing and delivery
16 specifications of the Purchase Orders. The Manufacturing Agreement even
17 identifies very specific rights and remedies Petters may employ in the event
18 Starlight fails to comply with the manufacturing and delivery specifications. [*Id.* at
19 5a, d, and 6b.]

20 Accordingly, Starlight's claim that the Manufacturing Agreement does not
21 impose any obligations to deliver products or for payments for products is
22 erroneous.

23 **3. Starlight's claims do not arise from a separate Factoring**
24 **Agreement.**

25 The terms of the Factoring Agreement are irrelevant to this dispute. The
26 Factoring Agreement merely provided a financing vehicle to give Starlight the
27 capital necessary to fulfill Petters' purchase orders and manufacture goods pursuant
28

1 to those orders. Petters is not a party to the Factoring Agreement and has no
2 obligations under the Factoring Agreement, which governs transactions between
3 Starlight and HSB. The sole obligations Petters has for payment of invoices arise
4 from its obligations outlined in the Manufacturing Agreement. Petters' payment of
5 monies due under the invoices directly to HSB does not serve to make Petters a
6 party to the Factoring Agreement, or form the basis for any other agreement which
7 would create an independent right of action by HSB against Petters.

8 **B. HSB Is Bound By The Arbitration Clause In the Manufacturing**
9 **Agreement.**

10 **1. This Court should adopt the reasoning and holding in**
11 **GMAC v. Springs Industries.**

12 GMAC Commercial Credit, LLC v. Spring Industries, Inc., involved a suit
13 brought by a finance assignee against a purchaser to recover monies allegedly owed
14 for rug sets manufactured by the assignor. 171 F.Supp.2d 209, 214 (S.D. N.Y.
15 2001). The finance assignee, GMAC, had been assigned all accounts receivable
16 generated by the rug manufacturer. Id. at 212. The agreement between the assignor
17 and finance assignee expressly limited the assignment to the right to collect the
18 assignor's accounts receivable, and expressly excluded the assignment of any other
19 rights and obligations. Id. The finance assignee subsequently brought suit against
20 the purchaser for monies due on unpaid purchase orders. Id. The purchaser moved
21 to stay or dismiss the action and compel arbitration. Id. The court held "that a
22 finance assignee suing on an assigned contract is bound by that contract's
23 arbitration clause unless it secured a waiver from the signatory seeking to arbitrate."
24 Id. at 214.

25 In arriving at its conclusion, the court rejected the argument advanced by the
26 finance assignee that it was not bound by an arbitration clause entered into by the
27 assignor. It characterized the assignee's reliance on a line of cases which predated
28

1 the adoption of the Uniform Commercial Code and which dated back to the first
 2 half of the century, as being misplaced. Id. at 213-14. This is the very same
 3 argument asserted by Starlight in this dispute. The GMAC court explained that
 4 “[t]he . . . common law principle that arbitration was an ‘obligation’ not assumed by
 5 a finance assignee was superseded by New York’s adoption of the Uniform
 6 Commercial Code . . . provision 9-318(1)²”³ Id. at 213. As the court observed,
 7 this UCC provision “is essentially an application of the ‘elementary ancient law that
 8 an assignee never stands in any better position than his assignor. An assignee is
 9 subject to all the equities and burdens which attach to the property assigned because
 10 he received no more . . . than his assignor.” Id. at 214 (citations omitted).

11 Although “the UCC does distinguish finance assignments from general
 12 assignments . . . it recognizes that general assignments confer both the assignor’s
 13 rights and obligations to the assignee whereas a finance assignment confers only the
 14 assignor’s rights.” Id. at 214 (citing UCC § 2-210(4) and Official Comment 5).

15 This rule, however, must be considered in light of the line of decisions which
 16 have found “that arbitration is a contractual *remedy, not an obligation*, and cannot
 17 be abrogated through a finance assignment.” Id. at 214 (emphasis in
 18 original)(citing (Banque De Paris et des Pays-Bas v. Amoco Oil Co., 573 F. Supp.
 19 1464, 1469-70 (S.D.N.Y. 1983); Cone Constructors, Inc. v. Drummond Community
 20 Bank, 754 So.2d 779 (Fla. App. 1st Dist. 2000)). It then concluded that “[t]he
 21 adoption of Article 9 of the U.C.C. means that a finance assignee suing on an
 22 assigned contract is bound by that contract’s arbitration clause unless it secured a
 23 waiver from the signatory seeking to arbitrate.” Id. (citing Pays-Bas, 573 F. Supp.
 24 at 1470-71.) Starlight asks this Court to disregard the sound reasoning and holding
 25

26 ² Now UCC § 9-404.

27 ³ Both California and Minnesota have adopted the identical Commercial
 28 Code provision and incorporated it into state law, thereby abrogating and
 superseding any common law principle that arbitration was an “obligation.” See
 Cal. Comm. Code § 9404 Minn. Stat. § 336.9-404

1 of GMAC, by characterizing the decision as an aberration rather than the well-
2 settled modern trend in the law. [Pl's. Memo. at pp. 6-7.] Starlight's argument is
3 not persuasive and without support in the law.

4 A survey of the case law in this area shows that the holding and reasoning in
5 GMAC has been affirmed by courts across the country. See Trippe Mfg. Co. v.
6 Niles Audio Corp., 401 F.3d 529, 533 (3rd Cir. 2005); Systran Fin. Services v.
7 Giant Cement Holding, Inc., 252 F.Supp.2d 500, 505-06 (N.D. Ohio 2003);
8 Southeastern Pennsylvania Transp. Auth., 2003 WL 21994811, at *3; Oxford
9 Commercial Funding, LLC v. Cargill, Inc., No. 00 C 4996, 2002 WL 31455989, at
10 *4 (N.D. Ill. Oct. 31, 2002). Each of these decisions is based on the premise that an
11 assignment to a finance assignee should not serve as a vehicle for abrogation of a
12 contractually negotiated remedy such as arbitration, and recognizes that "[a]n
13 arbitration provision would be of no value 'if a party could escape the effect of such
14 a clause by assigning a claim subject to arbitration between the original parties to a
15 third party.'" Systran, 252 F.Supp.2d at 506 (quoting Pays-Bas, 573 F. Supp. at
16 1470); see also GMAC, 171 F.Supp.2d at 216 ("Plainly, an assignment cannot alter
17 a contract's bargained-for remedial measures, for then the assignment would
18 change the very nature of the rights assigned")(citations omitted)).

19 Accordingly, this Court should follow the reasoning and holding of GMAC
20 and its progeny and hold that a finance assignee is bound by the arbitration clause
21 of the underlying agreement unless it has secured a waiver from the signatory
22 seeking to arbitrate.

23
24 **2. Starlight's implication that an arbitration clause can be**
25 **abrogated through a finance assignment has been rejected**
26 **by courts across the country.**

27 The primary argument raised by Starlight -- that it should not be bound by
28 the Manufacturing Agreement's arbitration clause because it only obtained the right

1 to receive payments from Petters -- has been expressly rejected in a case very
 2 similar to this. See Systran, 252 F.Supp.2d at 505-06. Systran involved a suit by a
 3 factor/finance assignee for unpaid invoices against a purchaser of transportation
 4 services. Id. at 502. The purchaser sought to compel arbitration, claiming that the
 5 underlying transportation services agreement between the assignor and the
 6 purchaser contained an arbitration clause. Id. The purchaser was on notice of the
 7 existing factoring arrangement and entered into the transportation services
 8 agreement with the service provider with knowledge of this agreement. Id. at 503.
 9 In responding to the purchaser's motion to compel, the factor argued that it was not
 10 required to arbitrate its claims because it was not a signatory to the underlying
 11 transportation services agreement and because it received only the right to payment
 12 of the accounts receivables. Id. at 503.

13 The court, after finding that the factoring agreement was governed by
 14 Article 9 of the Ohio Commercial Code,⁴ held that "[w]hen an Article 9 assignee
 15 asserts collection rights against an account debtor, the account debtor may respond
 16 with a defense or claim provided by [U.C.C. § 9-404]." Id. at 506. The court also
 17 held that:

18
 19 "[r]egardless of the fact that [the factor] was only assigned the right to
 20 payment under the transportation services agreement, [the purchaser]
 21 may properly assert the arbitration agreement as a defense because
 22 arbitration was a 'term[] of the agreement between the account debtor
 and assignor.'" Id. (quoting the Ohio Commercial Code equivalent of
 U.C.C. 9-404).

23 Id. This case is no different.

24 Here, Starlight, on behalf of HSB, claims it should not be required to
 25 arbitrate because it only received the right to payments from Petters, but here, as
 26 was the case in Systran, this assignment does not abrogate the Manufacturing
 27

28 ⁴ The version of the UCC adopted by Ohio is identical to the California and
 Minnesota Commercial Codes in all material respects.

1 Agreement's contractual remedy of arbitration. If HSB "did not want to arbitrate
2 disputes over collections from account debtors, it could have contracted with
3 [Starlight] to prevent it from entering into any agreement that contained arbitration
4 clauses. Because it did not do so, it is bound by the [Manufacturing Agreement's]
5 arbitration clause." Id. at 506. As set forth above, a holding to the contrary would
6 permit any party to a contract containing an arbitration clause to escape the reach of
7 the arbitration clause by simply assigning its payment rights under the agreement to
8 a third-party. The law should not permit such an absurd result.

9 **III. CONCLUSION**

10 For the foregoing reasons, and the reasons set forth in its Initial
11 Memorandum and attached exhibits, Petters respectfully requests that the Court
12 dismiss the claims asserted by Starlight, both on its own behalf, and on behalf of
13 Hang Seng Bank, and compel Starlight to submit those claims to binding
14 arbitration.

15
16 Dated: January 8, 2008

Respectfully Submitted,
JONES DAY

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18
19
20 By: 

Brian L. Johnson

21 Attorneys for Defendant
22 PETTERS CONSUMER BRANDS,
23 LLC
24

25 4301894

CERTIFICATE OF SERVICE

I, Yvonne C. Kametani, declare:

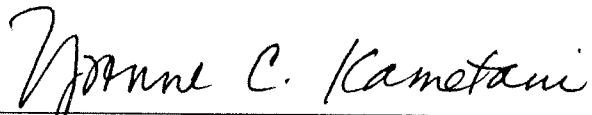
I am a citizen of the United States and employed in San Diego County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 12265 El Camino Real, Suite 200, San Diego, California 92130. On January 8, 2008, I served a copy of the **DEFENDANT'S REPLY IN SUPPORT OF MOTION TO COMPEL ARBITRATION** by electronic transmission.

I am familiar with the United States District Court, Southern District of California's practice for collecting and processing electronic filings. Under that practice, documents are electronically filed with the court. The court's CM/ECF system will generate a Notice of Electronic Filing (NEF) to the filing party, the assigned judge, and any registered users in the case. The NEF will constitute service of the document. Registration as a CM/ECF user constitutes consent to electronic service through the court's transmission facilities. Under said practice, the following CM/ECF users were served:

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Executed on January 8, 2008, at San Diego, California.



Yvonne C. Kametani